The second preliminary objection relates to the non-compliance with Order 52 Rules 2 and 3 of the Rules of the High Court. According to Mr. Annamalai (which is confirmed by the documents themselves) the Notice of Motion seeking leave was filed on December 31, 1986 and leave was subsequently granted by me on January 5, 1987. But, the Notice of Motion for Committal and the Statement under Order 52 Rule 2 Rules of the High Court were also filed on the same day *i.e.* December 31, 1986. Mr. Annamalai was of the view that the plaintiff had filed the present application for Committal prior to the granting of leave, which he considered as amounting to a substantive defect. Mr. J.B. Lim had conceded that both Motions were filed simultaneously on December 31, 1986 but contended that the Notice of Originating Motion for Committal was not intended to be entered for hearing and to be proceeded for hearing until leave was first obtained. In fact, the date of the hearing of this Originating Motion was given after leave was obtained. He submitted that this was an irregularity which could be cured or corrected under Order 2 of the Rules of the High Court. As for my part, after having gone through the entire file and relying myself on the Supreme Court decision in *Arthur Lee Meng Kwang* v. *Faber Merlin Malaysia Bhd. & Ors.*[2] I am satisfied that the irregularity in the present proceeding is of a technical nature which does not amount to a nullity and therefore can be corrected under Order 2 of the Rules of the High Court.

Finally, there was a third objection raised by Mr. Annamalai where he submitted that based on the true construction of Order 52 Rule 1(2)(a)(ii) Rules of the High Court, this application ought to have been heard by the High Court which granted the injunction order *i.e.* Court No. 1. Counsel also submitted that the contempt proceeding should have been commenced in the same Civil Suit No. 428 of 1986 and not by a separate originating motion. Without wasting much time, in my opinion, there is no merit in his objection because we are all fully aware that this Court is a court of competent jurisdiction and is empowered to try and punish any contempt of itself under section 13(2) of the Courts of Judicature Act 1964.

For the above reasons, the preliminary objections raised by the defendants are hereby dismissed with costs.

Order accordingly.

Solicitors: *Hisham, Sobri & Nadir; Annamalai & Co.; Johari, Goh & Associates.*

NOOR AINI BINTE MAJID v. PENTEX SDN. BHD.

[O.C.J. (Edgar Joseph Jr.J.) February 2 & 24, 1987]
[Penang – Civil Suit No. 22-63-1984]

Practice and Procedure – Injunction – Application to discharge injunction – Merits of application – Difficulty to enforce injunction.

The defendant applied for the discharge of an *ex parte* interlocutory prohibitory injunction restraining it, its servants or otherwise from evicting the plaintiff or in any other way preventing her from carrying on her business as a canteen operator at the defendant's factory, until after the trial of this action or until further order.

Held: the interlocutory injunction should be discharged and an enquiry as to damages should be made before the Senior Assistant Registrar.

Cases referred to:

(1) *American Cyanamid Co.* v. *Ethicon Ltd.* [1975] 1 All E.R. 504, 510.
(2) *Pickering* v. *Bishop of Ely* (1843) 2 Y & C.C.C. 249; 63 E.R. 109.
(3) *Johnson* v. *Shrewsbury and Birmingham Ry. Co.* (1853) 3 De G.M. & G. 914; 43 E.R. 358.
(4) *Williamson* v. *Lukey and Mulholland* (1931) 45 C.L.R. 282.
(5) *Miotti* v. *Belford* (1961) 79 W.N. (N.S.W.) 98.
(6) *Scandinavian Trading Tanker Co. AB* v. *Flota Petrolera Ecuatoriana* [1983] 2 All E.R. 763, 766.
(7) *Lavery* v. *Pursell* (1888) 39 Ch.D. 508.
(8) *Frith* v. *Frith* [1906] A.C. 254.
(9) *Ryan* v. *Mutual Tontine Westminster Chambers Association* [1893] 1 Ch. 116.
(10) *Atlas Steels (Aust) Pty. Ltd.* v. *Atlas Ltd.* (1948) 49 S.R. (N.S.W.) 157.
(11) *Manchester Corporation* v. *Connolly And Others* [1970] 1 Ch. 420.

CIVIL SUIT.

Tan Beng Hong for the plaintiff.
Chan Hon Wai for the defendant.

Cur. Adv. Vult.

Edgar Joseph Jr. J.: This was an application by the defendant for discharge of an *ex parte* interlocutory prohibitory injunction restraining it, its servants or agents or otherwise from evicting the plaintiff or in any other way preventing her from carrying on her business as a canteen operator at the defendant's factory at Prai, Free Trade Zone, Province Wellesley, until after the trial of this action or until further order.

It was common ground that the plaintiff had submitted a tender in writing for a licence to

operate a canteen at the plaintiff's factory aforesaid at a fee of $100 p.m. In this she succeeded, her licence to operate the canteen taking effect from November 25, 1985.

The plaintiff did in fact operate the canteen but then, on October 9, 1986 she received a letter dated from the plaintiff terminating her licence with effect from November 14, 1985 and requiring her to vacate the premises on the same day.

The rival affidavits disclosed many areas of acute conflict of evidence; for example, the plaintiff alleged that her licence was for a fixed term of three years, that she was required to and did pay a premium of $3,000 in cash to the Pengurus Pentadbiran of the defendant Company for which she got no receipt and, that although she ran the canteen satisfactorily without complaint, she was served with the notice of termination aforesaid and that too without being given an opportunity of being heard. On the other hand, the affidavit of the defendant's Administrative Manager (Enclosure 25) was diametrically opposed to what the plaintiff had alleged; for example, he affirmed that the plaintiff's licence was for a duration of one year at a fee of $100 p.m., no premium was demanded or received as alleged or at all, that the food, beverages and services rendered by the plaintiff were unsatisfactory in several respects, that her attention was drawn to this at a meeting held on February 5, 1986 and that her cashier had to be asked to leave the factory for insolent and improper conduct when dealing with the defendant's employees.

However, I did not think such conflicts of evidence ought to be disposed of on affidavit evidence; the proper place for their determination would be at the final hearing.

As Lord Diplock said in his speech in *American Cyanamid Co.* v. *Ethicon Ltd.*[1] "It is no part of the Court's function at this stage of the litigation" – that is, in considering a motion for an interlocutory injunction, I interpolate – "to try to resolve conflicts of evidence on affidavit as to the facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature consideration."

Accordingly, what I propose to do is to base my decision on certain plain facts which were either undisputed or admitted.

It was manifestly clear that the relationship of the parties had soured to such an extent that the elements of mutual trust and confidence no longer existed. In this context, I did not place undue stress on the plaintiff's own admission that two of her workers were caught stealing from the licensee of the Chinese canteen at the defendant's factory.

Upon the above facts, it seemed clear to me that although the plaintiff sought to maintain the interlocutory injunction she was in substance, seeking specific performance of her contract to operate her canteen license. The general undesirability from the view of public policy, to force individuals to maintain certain personal relationships even though they have earlier freely agreed to do so has, for a long time, been recognised by the Courts (see, for example, *Pickering* v. *Bishop of Ely*,[2] *Johnson* v. *Shrewsbury and Birmingham Ry. Co.*,[3] *Williamson* v. *Lukey and Mulholland*[4] and *Miotti* v. *Belford*[5]) and ordinarily the proper course is to confine the parties to their remedies at law.

In this context, Lord Diplock in *Scandinavian Trading Tanker* v. *Flora Petrolera Ecuatoriana*[6] saw no reason to distinguish between a contract of services and a contract for services (such as was the plaintiff's contract in the present case) for he said at page 766 at *et seq:*

> "A time charter, ... is a contract for services ... Being a contract for services it is thus the very prototype of a contract of which before the fusion of law and equity a court would never grant specific performance: see *Clarke* v. *Price* 37 E.R. 270. *Lumley* v. *Wagner* [1843-60] All E.R. Rep. 368. In the event of failure to render the promised services, the party to whom they were to rendered would be left to pursue such remedies in damages for breach of contract as he might have at law ...
>
> To grant an injunction restraining the shipowner from exercising his right of withdrawal of the vessel from the service of the charterer, though negative in form, is pregnant with an affirmative order to the shipowner to perform the contract; juristically it is indistinguishable from a decree for specific performance of a contract to render services; and in respect of that category of contracts, even in the event of breach, this is a remedy which the English Courts have always disclaimed jurisdiction to grant ..."

I have already mentioned that the relationship between the parties had deteriorated to such an extent that the elements of trust and confidence no longer exist. I was therefore satisfied that the plaintiff's proper remedy, were she to succeed at the trial, would lie in an award of damages. In laying down the guidelines as to the approach of the courts to interlocutory applications *inter parties* for prohibitory injunctions, Lord Diplock in the *Cyanamid case* at page 408 said:

"The court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage."

Accordingly, I did not consider it necessary to consider the balance of convenience but, had it been necessary to do so, I should have thought that the balance of convenience favoured the defendant rather than the plaintiff. It is true that the plaintiff claimed that she had invested much money in setting up the canteen but, on the other side of the scale, I could not look askance at the defendant's claim that there are stored in its factory valuable machinery and inflammable material, such as chemicals, so that if the plaintiff were allowed continued free access to its factory, there was a real apprehension on its part that the safety thereof would be at risk. This makes security of the factory a matter of the first importance.

The plaintiff's canteen is comprised in a room of one of the defendant's buildings within the precints of the factory. In these circumstances, it seemed to me that the defendant has justification for the apprehension aforesaid.

There were two further grounds for discharging the injunction and these may be stated shortly.

Clearly, had I maintained the interlocutory injunction, it would most probably have given rise to obligations so complex or unclear as to lead to applications to Court for enforcement of its order or to applications for amplification of its order with a view to defining further the obligations of the parties. This in turn may impose upon the Court the intolerable burden of continued superintendence. To illustrate and to emphasize this point, mention must be made of the fact that following the grant of the *ex parte* order the plaintiff took out two applications: one for leave to commit the Administrative Officer of the defendant Company to prison for alleged infringement of the interlocutory injunction, to wit, by preventing vehicles supplying goods to the plaintiff's canteen from entering the factory (Enclosure 11) and another seeking amplification of the same by seeking to prohibit the defendant from engaging in four separate types of activity (Enclosure 19).

There is a consistent current of judicial opinion that in situations such as this Courts have refused injunctions: see *Lavery* v. *Pursell*,[7] *Frith* v. *Frith*,[8] *Ryan* v. *Mutual Tontine Westminster Chambers Association*[9] *and Atlas Steels (Aust) Pty. Ltd.* v. *Atlas Ltd.*[10] The individual Judge's own intuitive sense of what is the appropriate course to take in the particular circumstances of each case would probably be an important or even decisive factor.

The other further ground for my decision in this case, though I did not place undue stress on it, was this: had I maintained the interlocutory injunction, I would virtually have given the plaintiff the whole of the relief she was seeking in the suit, before the final hearing, for it was most probable, that by the time the action was heard and finally determined, the period of the licence, as contended for by the plaintiff, though disputed by the defendant, would have expired. This, of course, was no bar to the interlocutory injunction being maintained if there was plainly no defence to the action and the only object in raising a defence was to obtain delay: *Manchester Corporation* v. *Connolly*.[11] In the present case, however, I was wholly satisfied that the defence had raised serious questions to be tried and there was no question of it seeking to obtain delay.

In the result, I made an order in terms of the defendant's application by discharging the interlocutory injunction and directing an enquiry as to damages before the Senior Assistant Registrar. In consequence, the plaintiff's two applications aforesaid were dismissed. The defendant was, of course, to have the costs of the proceedings in any event.

Order accordingly.

Solicitors: *Tan Beng Hong & Co.; Daud & Partners.*